Petition

81-1924

Supreme Court, U.S.
FILED
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No. —

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARRY S. CHAMBERLAIN,
Petitioner

v.

ARTHUR PHILLIPS AND COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Robert C. Daniels
Steven Craig Gillman

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QUESTIONS PRESENTED

1. Did not Respondent, Arthur Phillips and Company, Inc., by engaging in numerous commercial transactions and deriving pecuniary benefit therefrom in the Commonwealth of Pennsylvania and by selling the subject crane involved in the accident giving rise to the instant action to a Pennsylvania corporation for shipment, delivery and use in the Commonwealth of Pennsylvania, satisfy the requirement of "doing business" under 42 Pennsylvania Consolidated Statutes §5321, *et seq.*, which includes "the shipping of merchandise directly or indirectly into or through the Commonwealth," and thereby subject itself to the exercise of personal jurisdiction under of the laws of the Commonwealth of Pennsylvania?

2. Did not Respondent, Arthur Phillips and Company, Inc., by engaging in numerous commercial transactions and deriving pecuniary benefit therefrom in the Commonwealth of Pennsylvania and by selling the subject crane involved in the accident giving rise to the instant action to a Pennsylvania corporation for shipment, delivery and use in the Commonwealth of Pennsylvania, satisfy the requirement of "minimum contact" under 42 Pennsylvania Consolidated Statutes §5321 *et seq.*, which states "in addition to the provisions of subsection(a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States", and thereby subject itself to the exercise of personal jurisdiction under of the laws of the Commonwealth of Pennsylvania?

3. When actions by a foreign corporation engaged in activities within the Commonwealth of Pennsylvania clearly satisfy the requirement of "doing business" un-

der the Pennsylvania Long Arm Statute, 42 Pennsylvania Consolidated Statutes §5322(a) and (b), is it not a derogation of Petitioner's constitutional rights to due process of law to have his action against such foreign corporation dismissed for lack of *in personam* jurisdiction, in the face of a statutory provision which states that in addition to the provisions of subsection (a) "jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States"?

INDEX

Page

QUESTIONS PRESENTED i

OPINIONS OF THE COURT BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS RELIED ON FOR ALLOWANCE OF WRIT 5

Certiorari is essential to prevent grave injustice to the Petitioner, and to preserve the laws of the United States in consonance with heretofore recognized principles of substantive due process under the Fourteenth Amendment of the United States Constitution, in that the Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania, as affirmed Per Curiam by the Judgment Order of the United States Court of Appeals for the Third Circuit, finding that Respondent lacked sufficient "minimum contacts" in the Commonwealth of Pennsylvania for the allowance of *in personam* jurisdiction over it in the Commonwealth, is violative of the law of the United States as enunciated by this Court in *International Shoe Company v. Washington*, 326 U.S. 310, and its progeny, and is contrary to the express language of the "Pennsylvania Long Arm Statute", which provides, *inter alia*, that "the shipping of merchandise directly or indirectly into or through the Commonwealth" shall constitute "doing business", and effectively renders the "Pennsylvania Long Arm Statute" a nullity and, in effect, declares the same to be unconstitutional.

CONCLUSION 13

APPENDIX A — Statutes Involved A-1

APPENDIX B — Court of Appeals Judgment Order A-4

APPENDIX C — Court of Appeals Order Sur Petition For Rehearing A-6

APPENDIX D — District Court Memorandum and Order A-7

APPENDIX E — District Court Certification Pursuant to F.R.C.P. 54(b) A-11

TABLE OF CASES CITED

Page

Aquarium Pharmaceuticals, Inc. v. Industrial Pressing & Packaging, Inc., 358 F. Supp. 441 (E.D.Pa. 1973) 8

Benn v. Linden Crane Company, 370 F.Supp. 1269 (E.D.Pa. 1973) 7

Columbia Metal Culvert Company v. Kaiser Industries Corporation, 526 F.2d 724 (3d Cir. 1975) 7

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) 10, 11

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) 8, 10, 12

International Shoe Company v. Washington, 326 U.S. 310 66 S.Ct. 154, 90 L.Ed.95 (1945) . 5, 8, 12

Kitzinger v. Gimbel Brothers, Inc., 240 Pa.Super. 345, 368 A.2d 333 (1976) 8

M & N Meat Company v. American Boneless Beef Corp., 380 F.Supp. 912 (W.D.Pa. 1974) 7

Parise v. AAA Westinghouse Corporation, 384 F.Supp. 1075 (W.D.Pa. 1974) 8

Proctor & Schwartz, Inc. v. Cleveland Lumber Company, 228 Pa.Super. 12, 323 A.2d 11 (1974) 7, 8

World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980) 9, 10, 11, 12

STATUTES CITED

	Page
All Writs Statute, 28 U.S.C.A. §1651	2
F.R.C.P. 54(b)	2, 4
28 U.S.C. 1254(1)	2
28 U.S.C. 1332	4
The Uniform Interstate and International Procedure Act 42 PS. §5321, *et seq.*	3
Generally 42 P.S. §5322	3, 6, 7, 8, 11, 12
Restatement of the Law of Torts, 2d, 402A	9

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BARRY S. CHAMBERLAIN,
Petitioner

v.

ARTHUR PHILLIPS AND COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Barry S. Chamberlain, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above case on December 22, 1981, affirming the Order of the United States District Court for the Eastern District of Pennsylvania in favor of Respondent, Arthur Phillips Company, Inc., and against Petitioner, Barry S. Chamberlain.

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit entered a Judgment Order, infra (Appendix B, pp. A-4—A-5) on December 22, 1981, affirming the Judgment in favor of Respondent, Arthur Phillips and Company, Inc., and against Petitioner, Barry S. Chamberlain. No Opinion was filed by the Court in support of its Order.

The United States Court of Appeals for the Third Circuit thereafter entered an Order denying appellant's Petition for Rehearing on January 14, 1982; no hearing was granted and no specific reason was given for the denial. Said Order is printed, infra (Appendix C, p. A-6).

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania in favor of Respondent, Arthur Phillips and Company, Inc., granting the Motion of Respondent to Dismiss for lack of *in personam* jurisdiction was entered on April 9, 1980. Said Memorandum and Order is printed, infra (Appendix D, pp. A-7—A-10).

The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania in favor of Petitioner, for certification of an Order for appeal pursuant to Federal Rule of Civil Procedure 54(b) was entered on May 29, 1981. Said Memorandum and Order is printed, infra (Appendix E, pp. A-11—A-16).

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the Judgment of the United States District Court for the Eastern District of Pennsylvania was entered on December 22, 1981 and is printed, infra (Appendix B, pp. A-4—A-5). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on January 14, 1982 and is printed, infra (Appendix C, p. A-6). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1) and the All Writs Statute, 28 U.S.C.A. §1651.

STATUTES INVOLVED

The Statutory provisions involved are 42 Pennsylvania Consolidated Statutes §5321, et seq. The specific statutory provision applicable in this matter, 42 Pennsylvania Consolidated Statutes §5322, is printed, infra (Appendix A, pp. A-1—A-3).

STATEMENT OF THE CASE

On August 2, 1977, Petitioner, a dock builder employed by J.H. Terry Company of Pennsylvania, fell from the top of a fifty-ton crawler crane and sustained serious personal injuries. The subject crane was sold by Respondent, Arthur Phillips and Company, Inc., a Maryland corporation, to a Pennsylvania corporation for shipment, delivery and use in Pennsylvania.

Petitioner instituted a civil action in the Court of Common Pleas of Philadelphia County, Commonwealth of Pennsylvania against Harnischfeger Corporation, the manufacturer of the crane, and Respondent, alleging, *inter alia*, negligence, strict liability and breach of warranty in the manufacture, maintenance, distribution, assembly and sale of the subject crane. Harnischfeger Corporation removed the action to the United States District Court for the Eastern District of Pennsylvania and removal jurisdiction was based on diversity of citizenship. 28 U.S.C. §1332.

Respondent filed a motion to dismiss Petitioner's Complaint, alleging the absence of *in personam* jurisdiction and the United States District Court for the Eastern District of Pennsylvania issued a Memorandum and entered an Order on April 9, 1980, granting the Motion of Respondent to Dismiss Petitioner's Complaint as to Respondent for lack of *in personam* jurisdiction.

The United States District Court for the Eastern District of Pennsylvania issued a second Memorandum and entered a second Order on May 29, 1981 certifying the Order dismissing Respondent as a "final order" for purposes of appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On December 22, 1981, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the Judgment in favor of Respondent dismissing it as a party. A Petition for Rehearing by the Court of Appeals in Banc was denied on January 14, 1982.

The issues presented by this Petition regard whether Respondent had sufficient "minimum contacts" with the Commonwealth of Pennsylvania for the exercise of *in personam* jurisdiction over it under the "Pennsylvania Long Arm Statute". Respondent's activities in and relating to Pennsylvania generally and to the transaction involving the subject crane in particular, include the sale of the crane to a Pennsylvania corporation for shipment, delivery and use in the Commonwealth of Pennsylvania.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

CERTIORARI IS ESSENTIAL TO PREVENT GRAVE INJUSTICE TO THE PETITIONER AND TO PRESERVE THE LAWS OF THE UNITED STATES IN CONSONANCE WITH HERETOFORE RECOGNIZED PRINCIPLES OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT THE MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR TH EASTERN DISTRICT OF PENNSYLVANIA, AS AFFIRMED PER CURIAM BY THE JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FINDING THAT RESPONDENT LACKED SUFFICIENT "MINIMUM CONTACTS" IN THE COMMONWEALTH OF PENNSYLVANIA FOR THE ALLOWANCE OF *IN PERSONAM* JURISDICTION OVER IT IN THAT COMMONWEALTH, IS VIOLATIVE OF THE LAW OF THE UNITED STATES AS ENUNCIATED BY THIS COURT IN *INTERNATIONAL SHOE COMPANY V. WASHINGTON*, 326 U.S. 310, AND ITS PROGENY, AND IS CONTRARY TO THE EXPRESS LANGUAGE OF THE "PENNSYLVANIA LONG ARM STATUTE", WHICH PROVIDES, *INTER ALIA*, THAT "THE SHIP-

PING OF MERCHANDISE DIRECTLY OR INDIRECTLY INTO OR THROUGH THE COMMONWEALTH" SHALL CONSTITUTE "DOING BUSINESS", AND EFFECTIVELY RENDERS THE "PENNSYLVANIA LONG ARM STATUTE" A NULLITY AND, IN EFFECT, DECLARES THE SAME TO BE UNCONSTITUTIONAL.

1. The actions of Respondent by conducting business in the Commonwealth on occasions in the past and by selling the subject crane involved in the accident giving rise to the instant action to a Pennsylvania corporation for shipment, delivery and use in the Commonwealth of Pennsylvania clearly satisfy at least six clauses of the "Pennsylvania Long Arm Statute".[1] However, it *must* be noted that the actions of Respondent need only satisfy a single definitional clause of the "long arm statute" to permit the exercise of *in personam* jurisdiction over Respondent within the Commonwealth of Pennsylvania.

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1. 42 Pennsylvania Consolidated Statutes §5322 effective June 27, 1978, by virtue of the Judiciary Act Repealer Act of 1978, April 28, PL. 202, No. 53, provides:

"Basis of Personal Jurisdiction over Persons Outside this Commonwealth

(a) General rule. A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) *Transacting any business in this Commonwealth.* Without excluding other acts which may constitute transacting business in this Commonwealth, *any of the following shall constitute transacting business for the purpose of this paragraph:*

(i) The *doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.*

(ii) *The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary* benefit or otherwise realizing pecuniary benefit or otherwise accom-

Under the current statute it is clear that Respondent's shipment of the crane need not be part of a series of acts or be predicated upon the intention of initiating a series of acts. *Benn v. Linden Crane*, 370 F. Supp. 1269 (Ed. Pa. 1973). A *single shipment* of merchandise is sufficient to subject a nonresident corporation to *in personam* jurisdiction under the statute. *Columbia Metal Culvert Company v. Kaiser Industries Corporation*, 526 F.2d 724 (3d Cir. 1975); *M & N Meat Company v. American Boneless Beef Corporation*, 380 F. Supp 912 (W.D. Pa. 1974); and *Proctor & Schwartz, Inc. v. Cleveland Lumber* Company, 228 Pa. Super. 12, 323 A. 2d 11 (1974). This is especially so where, as in the instant case, the single shipment is "intimately connected" with the Petitioner's cause of action. *Columbia Metal Culvert Company v. Kaiser Industries Corporation, supra* at 729.

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plishing an object with the intention of initiating a series of such acts.

(iii) *The shipping of merchandise directly or indirectly into or through this Commonwealth.*

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(2) *Contracting to supply services or thing in this Commonwealth.*

(3) Causing harm or tortious injury by any act or omission in this Commonwealth.

(4) *Causing harm or tortious injury in this Commonwealth by any act or omission outside this Commonwealth.*

(b) *Exercise of full constitutional power over non-residents. In addition to the provisions of subsection(a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.* (Emphasis Added).

It is also unnecessary for the foreign corporation or its agents to have ever entered the Commonwealth or in any manner engaged in the solicitation of business, either directly or indirectly, within the Commonwealth, so long as a single shipment is made.

It is undisputed that Respondent shipped the subject crane into the Commonwealth with knowledge of its destination, and whether the shipment was made directly or indirectly is immaterial for purposes of the Pennsylvania "Long Arm Statute". See *Parise v. AAA Westinghouse Corporation*, 384 F. Supp. 1075 (W.D. Pa. 1974), and *Aquarium Pharmaceuticals, Inc. v. Industrial Pressing & Packaging Company*, 358 F. Supp. 441 (E.D. Pa. 1973).

In light of the foregoing, it is abundantly evident that Respondent's actions satisfy the jurisdictional requirements of the "Pennsylvania Long Arm Statute", and that the United States District Court for the Eastern District of Pennsylvania should have exercised *in personam* jurisdiction over Respondent.

2. The rulings of the courts below are clearly repugnant to the principle of substantive due process as enunciated in numerous decisions of this Court. Initially, it should be noted that the "Pennsylvania Long Arm Statute" is "co-extensive" with the substantive due process requirements of the Fourteenth Amendment. *Kitzenger v. Gimbel Brothers, Inc.*, 240 Pa. Super. 345, 368 A.2d 333 (1976); and *Proctor & Schwartz, Inc., v. Cleveland Lumber Company*, 228 Pa. Super 12, 323 A.2d 11 (1974).

The threshold consideration in determining whether "long arm" jurisdiction exists has been articulated by this Court in the "minimum contacts" doctrine. *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and *Hanson v. Denckla*, 357 U.S. 235, 78, S.Ct. 1228, 2 L.Ed. 2d 1283 (1958). The Memorandum and Order entered by the District Court in the case *sub judice*, denying jurisdic-

tion over Respondent completely subverts that doctrine.

The District Court's reliance on *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed. 2d 490 (1980), is entirely misplaced. In that case, plaintiffs, residents of New York, brought an action, under §402A of the *Restatement of Torts 2d*, against the sellers, distributors and manufacturer of an automobile, in an Oklahoma State Court, claiming that their injuries resulted from a defective gas tank. Plaintiff had purchased the automobile from a New York dealer and during the course of a trip to the State of Arizona were struck in the rear, while travelling through the state of Oklahoma. Plaintiffs named as defendants the automobile's manufacturer (Audi), its importer (Volkswagen), its regional distributor (World-Wide) and its retail seller (Seaway). World-Wide and Seaway claimed that the Oklahoma Court lacked jurisdiction under the "Oklahoma Long Arm Statute" since neither of them carried on any activity whatsoever in the State of Oklahoma. The Court summarized the pertinent facts as follows:

> "The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New York. It distributes vehicles, parts and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondent adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at

> oral argument, Tr. of Oral Arg. 32, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case. (*Id.* at 100 S.Ct. 563)

In holding that Seaway and World-Wide could not constitutionally be subject to jurisdiction under the "Oklahoma Long Arm Statute" the Court emphasized that while the entry of the automobile into Oklahoma was "forseeable" the Defendants did not purposely avail themselves of the priviledge of conducting activities within the form.

> "This is not to say, of course, that forseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the *mere* likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being hauled into Court there.
>
> * * *
>
> When a corporation '*purposefully avails itself of the privilege of conducting activities within the forum State*', *Hanson v. Denckla*, *Supra* at 253, 78 S.Ct., at 1240, it has clear notice that it is subject to suit there, and can act to alleviate the risk of a burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.
>
> * * *
>
> *The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.* Compare *Gray v. American Radiator &*

Standard Sanitary Corp., 22 Ill. 2d 432,176 N.E. 2d 761 (1961). (*Id.* at 567) (Emphasis added).

The activities of Respondent herein are clearly distinguishable from those of World-Wide and Seaway. In *World-Wide,* the entry of the automobile into Oklahoma was fortuitous; the entry of the crane into Pennsylvania was purposeful. Seaway and World-Wide had never conducted business in Oklahoma; Respondent had engaged in numerous business transactions in Pennsylvania. Seaway and World-Wide had never realized any pecuniary gain from doing business in Oklahoma; Respondent sold the subject crane for shipment into and use in Pennsylvania to a Pennsylvania corporation for Twelve Thousand ($12,000.00) Dollars, and had additionally engaged in previous commercial dealings with the same Pennsylvania based corporation for pecuniary gain.

Respondent has thus purposely availed itself of the privilege of doing business in the Commonwealth of Pennsylvania and should have, therefore, reasonably expected to be subject to suit when it sold a defective product to a Pennsylvania corporation and engaged in a systematic course of dealings with a Pennsylvania based equipment broker.

3. The District Court's refusal to consider whether Respondent's conduct satisfied any of the "doing business" provisions in §5322(a) is tantamount to a declaration that the "Pennsylvania Long Arm Statute" is unconstitutional. The Commonwealth recognized that "long arm jurisdiction" shall extend to the fullest extent allowed under the constitution of the United States and may be based upon the most minimum contact. 42 Pennsylvania Consolidated Statutes §5322(b). Jurisdiction may also be based upon any act which constitutes "doing business" within the Commonwealth. 42 Pennsylvania Consolidated Statutes §5322(a).[2] The scope of

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2. 42 Pennsylvania Consolidated Statutes §5322, *Supra.*

jurisdiction over a person in the Commonwealth may be based upon acts enumerated in subsection(a) *or* from acts forming the basis of jurisdiction under subsection(b). 42 Pennsylvania Consolidated Statutes §5322(c).[3] (Emphasis added).

In its Memorandum of April 9, 1980, the District Court refused to consider whether Respondent was "doing business" in Pennsylvania under §5322(a) reasoning that "[a]lthough §5322(b), might arguably be construed as supplementary, not limiting to §5322(a), such a construction would necessarily raise a serious question as to §5322's constitutionality." This approach is clearly contrary to the express provisions of §5322(b) which provide that the language of §5322(b) is "in *addition*" to the definitions of doing business under §5322(a). By failing to consider whether the activities of Respondent constituted "doing business", the Court effectively held that the detailed guidelines of §5322(a) are meaningless, and rendered such provisions a nullity. It is axiomatic that such a result was never intended by the Pennsylvania Legislature. If an act which clearly satisfies the "doing business" requirement of §5322(a) may be held not to meet the constitutional requirement of "minimum contact" embodied in §5322(b) then the entire "Long Arm Statute" fails constitutional scrutiny. Similarly, the United States District Court for the Eastern District of Pennsylvania, by failing to first ascertain whether Respondent's actions constitute "doing business" under §5322(a), has effectively ruled that the "Long Arm Statute" is unconstitutional, in contravention of Petitioner's rights to procedural and substantive due process of law under both the United States and Pennsylvania Constitutions. *World-Wide Volkswagen Corporation v. Woodson, supra; Hanson v. Denckla, supra; International Shoe Company v. Washington, supra.*

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3. 42 Pennsylvania Consolidated Statutes §5322(c) provides:

(c) Scope of jurisdiction. — When jurisdiction over a person is based solely upon this section, only a cause of action or

CONCLUSION

The decision below undermines the heretofore inviolate Supreme Court doctrine of "minimum contacts" as it applies to the substantive due process under the Fourteenth Amendment and renders a result which is clearly contrary to the express and unambiguous language of the "Pennsylvania Long arm Statute". Moreover, the District Court decision impliedly renders the "Pennsylvania Long Arm Statute" unconstitutional. Such is contrary to the present policy and needs of the courts of the United States in their attempt to limit the appeals to and workload of the Court of Appeals. Accordingly, Certiorari should be granted, and the decision below reversed.

Respectfully submitted,

Robert C. Daniels,
Steven Craig Gillman,

Robert C. Daniels, P.C.
Counsel For Petitioner

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other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

Appendix

APPENDIX A

42 Pennsylvania Consolidated Statutes 5321

§ 5321. Short title of subchapter

This subchapter shall be known and may be cited as the "Uniform Interstate and International Procedure Act."

1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978.

42 Pennsylvania Consolidated Statutes 5322

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) General rule.—A tribunal of this Commwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or

not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6) (i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L. 789, No. 285), known as "The Insurance Department Act of 1921."[1]

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incompetent.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

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1 40 P.S. § 221.4.

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) Exercise of full constitutional power over nonresidents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) Service outside this Commonwealth.—When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) Inconvenient forum.—When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. As amended 1978, April 28, P.L. 202, No. 53, § 10(61), effective June 27, 1978; 1980, Oct. 5, P.L. 693, No. 142 § 203(b), effective in 60 days.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2164

BARRY S. CHAMBERLAIN,
Appellant

v.

HARNISCHFEGER CORPORATION c/o
C. T. Corporation System and
ARTHUR PHILLIPS AND COMPANY INC.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
C. A. No. 79-2966

Submitted Under Third Circuit Rule 12(6)
December 15, 1981

Before: ADAMS, GIBBONS and GARTH, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs to be borne by appellant.

By the Court,

ARLEN M. ADAMS
Circuit Judge

Attest:

SALLY MRVOS,
Clerk

Dated: December 22, 1981

Certified as a true copy and issued in lieu of a formal mandate on Janaury 22, 1982.

Test:

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2164

BARRY S. CHAMBERLAIN,

Appellant

HARNISCHFEGER CORPORATION, etc., et al.
(C.A. No. 79-2966)

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Arlin M. Adams
Circuit Judge

Dated: January 14, 1982

APPENDIX D

MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DATED APRIL 9, 1980, PER SHAPIRO, J., GRANTING THE MOTION OF DEFENDANT, PHILLIPS, TO DISMISS FOR LACK OF *IN PERSONAM* JURISDICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY S. CHAMBERLAIN	:	Civil Action
	:	
v.	:	
	:	
HARNISCHFEGER CORPORATION and	:	
ARTHUR PHILLIPS AND COMPANY, INC.	:	No. 79-2966

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. APRIL 9th, 1980

Plaintiff, a resident of New Jersey, brings this action for personal injuries received on August 2, 1977 while working in Pennsylvania. The defendants are Harnischfeger Corporation ("Harnischfeger"), a Delaware Corporation and manufacturer of the crane allegedly involved in the accident, and Arthur Phillips and Company ("Phillips"), a Maryland Corporation, owner and possessor of the crane from 1957 to 1972. Defendant Phillips filed a motion to dismiss for lack of personal jurisdiction after defendant Harnischfeger timely removed the action to federal court by reason of the diversity of citizenship of the parties. Plaintiff has been permitted discovery on the jurisdictional aspects of this case.

Under Pennsylvania's long-arm statute, effective June 27, 1978, which governs in this action filed July 31, 1979, jurisdiction exends "to the fullest extent allowed under the Constitution of the United States and may be

based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. C.S.A. §5322(b). Although §5322(b) might arguably be construed as supplementary, not limiting as to §5322(a), such a construction would necessarily raise a serious question as to §5322's constitutionality. Absent a Pennsylvania state court precedent requiring such an approach, however, the Court proceeds directly to consider whether, under §5322(b), defendant Phillips has had the constitutionally minimum contact with Pennsylvania to sustain jurisdiction. *E.g., Scorpio Music Distributors, Inc. v. Surplus Records and Tapes*, C.A. No. 79-433 (E.D.Pa., December 10, 1979); *Donner v. Tams-Witmark Music Library, Inc.*, C.A. No 78-2895 (E.D.Pa. December 3, 1979); *Silverstein v. Aljean Farms, Inc.*, C.A. No. 78-3453 (E.D.Pa. October 2, 1979). Plaintiff bears the burden of establishing long-arm jurisdiction. *Silverstein, supra*, at 1.

Under the facts of record, the Court finds that plaintiff fails to establish the constitutionally minimum contacts. In *World-Wide Volkswagen Corp. v. Woodson*, 48 U.S.L.W. 4079 (January 21, 1980), the Supreme Court refused to find *in personam* jurisdiction based solely on the foreseeability of a chattel's likelihood of "find[ing] its way" into a forum. Rather, it held, "it is that defendant's conduct and connection with the forum State" must be such that "he should reasonably anticipate being haled into court there." U.S.L.W., at 4082. Defendant Phillips has not done business in Pennsylvania since the late 1940's and early 1950's. It does not regularly sell cranes or other equipment directly to Pennsylvania customers, nor does it indirectly serve or seek to serve the Pennsylvania market. Indeed, the record shows that Phillips is a construction company that rarely sells used construction equipment to anyone.

In the specific transaction involving the crane allegedly involved in plaintiff's accident, a Pennsylvania purchaser came to Phillips in Baltimore; Phillips did not

leave Maryland at the negotiation, agreement, or delivery stage. Although plaintiff's supplementary brief in opposition to the motion to dismiss states that Phillips shipped the crane into Pennsylvania, such statements are not part of the record. At argument, plaintiff conceded that the record shows no more than that the crane was purchased from Phillips "as is, where is, Baltimore, Maryland" and was shipped to Pennsylvania from the premises of Phillips by a non-party to this suit for resale to plaintiff's employer. Although Phillips had knowledge that the crane was being shipped to a Pennsylvania address by the purchaser, the Court cannot say that when defendant Phillips agreed to sell the crane in Baltimore in 1972 to a Pennsylvania purchaser it should have reasonably anticipated being subject to liability to the employee of a subsequent purchaser in Pennsylvania in 1979. *See, International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

In addition, in *Empire Abrasive Equipment Corp. v. H. H. Watson, Inc.*, 567 F.2d 554 (3d Cir. 1977), our Circuit Court emphasized considerations of federalism along with fairness to parties in applying the minimum-contacts test. Thus, a state must have a "palpable interest" in maintenance of the lawsuit. 567 F.2d at 557. This interest, while arguably present because the *locus* of the accident was in Pennsylvania, is certainly at its minimum in this case, where none of the parties are citizens of the Commonwealth and none are incorporated or maintain a principal place of business here. The limitations to jurisdiction based on federalism and fairness to parties "interact conjunctively," *see id.* at 557, and defeat jurisdiction over Phillips in this action.

Plaintiff's supplemental memorandum contra defendant Phillips' motion to dismiss requests that if jurisdiction is lacking, "this action against Phillips be not dismissed, but rather transferred to the appropriate United States District Court of Maryland." However, a district court may transfer a civil action for the convenience of

parties pursuant to 28 U.S.C. §1404(a) only "to any other district or division where it might have been brought." Absent any averments of record to establish that the instant action might have been brought against these defendants in a particular district, this Court has not been presented with facts of record warranting an order of transfer.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY S. CHAMBERLAIN	:	Civil Action
	:	
v.	:	
	:	
HARNISCHFEGER CORPORATION and ARTHUR PHILLIPS AND COMPANY, INC.	:	No. 79-2966

ORDER

AND NOW, this 4th day of April, 1980, upon consideration of the motion of defendant Arthur T. Phillips and Company to dismiss for lack of *in personam* jurisdiction, it is ORDERED that Defendant Phillips' motion to dismiss is GRANTED, and plaintiff's complaint is DISMISSED as to Arthur Phillips and Company.

By the Court:
Norma L. Shapiro
Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY S. CHAMBERLAIN	:	Civil Action
	:	
v.	:	
	:	
HARNISCHFEGER CORPORATION and ARTHUR PHILLIPS AND COMPANY, INC.	:	No. 79-2966

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. MAY , 1981

Plaintiff Barry S. Chamberlain, a citizen of New Jersey, brought this action in the Court of Common Pleas of Philadelphia County against defendants Harnischfeger Corporation ("Harnischfeger"), a Delaware corporation, and Arthur Phillips and Company, Inc. ("Phillips"), a Maryland corporation. Harnischfeger timely removed the case to federal court as a diversity action.

Plaintiff alleged that he suffered severe personal injuries when he slipped and fell while working upon a 50-ton crawler crane manufactured, designed and sold by Harnischfeger; Phillips, owner and possessor of the crane from 1957 to 1972, sold the crane in 1972 to a purchaser who subsequently transferred it to plaintiff's employer. Defendant Phillips moved to dismiss the action against it for lack of personal jurisdiction. Defendant Phillips had not done business in Pennsylvania since the late 1940's and early 1950's, it did not regularly sell cranes or other equipment directly to Pennsylvania customers, it did not indirectly serve or seek to serve the Pennsylvania market, and it rarely sold used construction equipment to anyone. Phillips did not leave Maryland when negotiating or contracting for the sale of the crane involved in the injuries to plaintiff. The Pennsylvania purchaser came to Phillips in Baltimore. The terms of the purchase provided for delivery of the crane

"as is, where is, Baltimore, Md." The court held that when Phillips agreed in 1972 to resell its used crane to a Pennsylvania purchaser, it should not reasonably have anticipated being subject in 1979 to liability in Pennsylvania to the employee of a subsequent purchaser. Finding that plaintiff failed to establish the minimum contacts constitutionally required, defendant Phillips' motion was granted by Order of April 9, 1980.

Plaintiff's appeal from this decision was dismissed on December 11, 1980 by judgment order of the Court of Appeals for the Third Circuit stating:

> It is ADJUDGED AND ORDERED that the appeal will be dismissed without prejudice to the right of appellant to apply to the district court for a determination and direction under F.R.C.P.54(b). However, we express no opinion as to whether the determination and direction should be made; this being a matter within the discretion of the district court. If the determination and direction are made, a new appeal may come before us on the present briefs and record supplemented to show subsequent proceedings.

Now before the court is plaintiff's subsequent petition for direction of a final judgment for defendant Phillips and an express determination that there is no just reason for delay in order to allow immediate appeal of this court's Order dismissing Phillips pursuant to F.R.C.P. 54(b).[1] The petition is opposed by defendant Phillips.

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1. Rule 54(b) provides:

(b) Judgment upon Multiple Claims or Involving Multiple Parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of

For the reasons which follow, the court will grant the petition.

Three conditions must exist before a Rule 54(b) direction and determination may be made. The first condition, that multiple claims for relief or multiple parties are involved, clearly exists; this action is against two defendants. If there are multiple parties, there need only be one claim in the action. *See*, 10 Wright & Miller, Federal Practice and Procedure, §2656 (1973); *Eisenhower v. DiCiurcio*, C.A. No. 79-4128 (E.D.Pa. November 17, 1980).

The second condition, that there is a final decision resolving the rights and liabilities of at least one party, is also met. A dismissal for lack of personal jurisdiction disposes of the claim completely against that party. 10 Wright & Miller, Federal Practice and Procedure, §2656 (1973); *see, Bernardi Brothers, Inc. v. Pride Mfg., Inc.*, 427 F.2d 297 (3d Cir. 1970) (Rule 54(b) certification where some defendants dismissed for lack of personal jurisdiction).

The third condition for a Rule 54(b) certification is that the court finds there is no just reason for delaying an appeal. A request that this determination be made is addressed to the discretion of the trial judge; the decision must depend on the facts of the particular case. *See generally*, 10 Wright & Miller, Federal Practice and Procedure §2659 (1973). *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980). In *Curtiss-Wright*, the Supreme Court relaxed the standard for certification of appeals under Rule 54(b) which had previously prevailed in this Circuit (*see, Eisenhower, supra*, at 7, and cases cited therein), by rejecting the view urged by de-

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decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

fendant Phillips here, that certification is to be utilized only in the infrequent harsh cases.[2] Rather, the Court stated that, "however accurate it may be as a description of cases qualifying for Rule 54(b) treatment, the phrase 'infrequent harsh case' in isolation is neither workable nor entirely reliable as a benchmark for appellate review." *Curtiss-Wright, supra,* at 12. As noted in *Eisenhower, supra,* at p. 6, the "touchstone in this exercise of discretion is the interest of sound judicial administration."

Weighing the factors in this case leads to a conclusion that sound judicial administration would be served by certification under Rule 54(b). The nature of the order makes clear that "no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Curtiss-Wright, supra,* at 11 (a factor properly considered by the district court upon request for Rule 54(b) certification). Should the Circuit Court determine the jurisdictional issue presented at this time, it would not reappear post trial if an appeal were then taken.

An appeal now also avoids the possibility of multiple trials. Plaintiff may now still litigate against Phillips in another judicial district but he will then be pursuing claims in two courts, with the possibility of inconsistent determinations in the trial courts and on appeal.[3] If plaintiff decides instead to appeal the dismissal of Phillips after trial, even if the dismissal were reversed on ap-

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2. Defendant Phillips' Reply to Plaintiff's Petition for Certification.

3. Phillips asserts that plaintiff might move to transfer to a forum where there is jurisdiction over both defendants. However, it is not clear if defendant Harnischfeger would acquiesce or that the motion would be granted. We have also considered the possibility that the statute of limitations on plaintiff's claim against Phillips may have run in the interim between Phillips' dismissal and resolution of plaintiff's premature appeal, which would preclude initiation of a suit against Phillips upon this cause of action in another judicial district.

peal, a second personal injury and products liability trial involving substantial repetition of factual matters would be necessitated. If the dismissal were affirmed, the statute of limitations may then prevent litigation against Phillips in Maryland. Of course, it is possible that plaintiff may prevail against defendant Harnischfeger and be satisfied with that judgment. In that eventuality, whether or not Phillips is liable will be moot. But that likelihood is insufficient in itself to outweigh plaintiff's present practical choice between two simultaneous trials in two jurisdictions or two successive trials in the same jurisdiction. Plaintiff's predicament commends certification.

We have also considered the delay involved in not proceeding against defendant Harnischfeger while the appeal as to defendant Phillips is pending. However, plaintiff prefers this delay to the prospect of two trials and defendant Harnischfeger has not objected. The Court of Appeals has indicated in its Judgment Order that the appeal may come before it on the present briefs which will save time and effort. The expense of briefing this discrete issue of personal jurisdiction having already been undertaken, albeit due to plaintiff's premature appeal, it seems that appellate review of the court's determination as to defendant Phillips would now be appropriate.

Upon careful consideration, we determine that appeal at this time promises the most efficient use of judicial resources with the least expense and hardship to all parties and there is no justification for delay. An appropriate Order will issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARRY S. CHAMBERLAIN	:	Civil Action
	:	
v.	:	
	:	
HARNISCHFEGER CORPORATION and	:	
ARTHUR PHILLIPS AND COMPANY, INC.	:	No. 79-2966

ORDER

AND NOW, this day of May, 1981, for the reasons set forth in the foregoing Memorandum, the court expressly determines that there is no just reason for delay and ORDERS that judgment is entered in favor of defendant Arthur Phillips and Company, Inc. and against plaintiff Barry S. Chamberlain. Plaintiff's petition for certification of an order for appeal pursuant to F.R.C.P. 54(b) is GRANTED.

By the Court:

Judge